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In The
Supreme Court of the United States
October Term, 1990

DAVID HOFFMAN, COMMISSIONER, DEPARTMENT
OF COMMUNITY AND REGIONAL AFFAIRS,
STATE OF ALASKA,

Petitioner,

v.

NATIVE VILLAGE OF NOATAK AND
CIRCLE VILLAGE,

Respondents.

On Writ Of Certiorari To The United States
Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR THE PETITIONER

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No. 89-1782

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ARGUMENT

**I. THE SOVEREIGN IMMUNITY OF STATES AND
THE ELEVENTH AMENDMENT BAR THIS LAW-
SUIT.**

The sovereign immunity arguments made by the Respondents miss the mark for several reasons. The arguments focus on the wrong party to this lawsuit. The States' sovereign immunity is at issue, not some interest of Indian tribes. The Indian tribes' interests have been and continue to be protected through the trust responsibility the United States owes to the Indian tribes and

through the ability of the United States to sue a State to vindicate that responsibility. On the other hand, the States' interests are protected within our constitutional system by their sovereign immunity and by requiring the United States to exercise its judgment about when and under what circumstances it should be overridden in furtherance of the interests of the Indian tribes.

There are compelling differences between the United States, the several States, and Indian tribes. Their respective places in our constitutional system preclude the result urged by the Respondents. The fact that Indian tribes were a political presence at the time the United States of America came into existence does not require that tribes be viewed as participating in the "federal structure" of the political regime created by the Constitution, and they clearly did not. It is argued that the union created by the Constitution could not function peaceably unless Indian tribes were able to sue States in federal court without their consent. The response to that argument is obvious: the Union has functioned peaceably without an abrogation of state sovereign immunity, and if a need exists for greater tribal access to the federal courts, the United States, as a trustee, can provide it.

A. This Court's Jurisprudence Contradicts the Respondents' Theories about the Sovereign Immunity of States Vis-a-Vis Indian Tribes.

No opinion of this Court has yet articulated what the Respondents argue, i.e., that the principle of sovereign immunity underlying the Eleventh Amendment does not apply to suits brought by a government. If the Respondents are correct, certain implications follow that hardly

appear to be favorable even to Indian tribes. For example, if sovereign immunity does not bar a suit brought by governments, then this Court's decisions in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) and *Puyallup Tribe v. Washington Game Dep't.*, 433 U.S. 165 (1977), were wrong in holding that a state cannot sue a tribe unless Congress has waived tribal sovereign immunity. If sovereign immunity does not bar suits brought by governments, why should a State not be able to sue an Indian tribe?

The Respondents' argument also makes unintelligible the decisions in *Arizona v. California*, 298 U.S. 558, 568 (1936) and *Kansas v. United States*, 204 U.S. 331, 341 (1907) that the sovereign immunity of the United States protects it from suit without its consent, even by a State. Similarly, the wisdom of this Court's ruling in *Monaco v. Mississippi*, 292 U.S. 313, 331 (1934), that a State cannot be sued by a foreign state without its consent, is also called into question by Noatak's argument.¹

In short, there is simply no persuasive basis for the claim that sovereign immunity does not apply to suits brought by governments.²

¹ The argument also means that *United States v. Texas*, 143 U.S. 621 (1892) (the United States can sue a State), and *South Dakota v. North Carolina*, 192 U.S. 286 (1904) (one State can sue another State) were wrongly decided because consent to suit implied from the structure of the Constitution would be unnecessary if sovereign immunity does not apply to suits brought by governments.

² The rationale for the doctrine of sovereign immunity, as stated by this Court in *Hans v. Louisiana*, 134 U.S. 1, 21 (1890), applies equally whether it is an individual or a government bringing suit, as long as the suit demands payment of public funds.

B. There is No Basis for the Argument that the American Political Structure Created by the Constitution Implies that Indian Tribes are able to Sue a State without its Consent.

Both Noatak and the amici Miccosukee Indian Tribe *et al.* argue that a correct understanding of the "federal structure" created by the Constitution leads to the conclusion that the States, by consenting to the Constitution, waived their sovereign immunity to suits brought in federal court by Indian tribes. Since no one could seriously argue that, by ratifying the Constitution, the States *expressly* consented to suits in federal court brought by Indian tribes, the "federal structure" argument must be an argument based on a theory of *constructive* consent. However, this Court does not favor the doctrine of constructive consent, especially when it is relied on to advance a claim that a constitutional right has been surrendered. As this Court stated in *Edelman v. Jordan*, 415 U.S. 651 (1974):

Constructive consent is not a doctrine commonly associated with the surrender of constitutional rights, and we see no place for it here. In deciding whether a State has waived its constitutional protection under the Eleventh Amendment, we will find waiver only where stated "by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction." (citations omitted)

Edelman, 415 U.S. at 673.

Moreover, if the structure of the Constitution was meant to allow an Indian tribe to sue a State in federal court without its consent, one would expect to find strong evidence for this in the text of the Constitution. However,

the text of the Constitution lends no support to this argument. See Pet. Br. at 11.

The lack of any language in the Constitution to support the "federal structure" argument leaves its proponents with a considerably more tenuous claim, i.e., that in the political system created by the Constitution, Indian tribes, in order to protect their very existence, must be able to sue a State without consent. Said another way, the ability of the Indian tribes to sue a State in federal court without the State's consent is necessary to the very functioning of the political structure and system created by the Constitution.

This approach, however, raises a very basic question. The Constitution is a compact entered into by the people of the several States. It sets out the nature and allocation of political power between the various States that were a party to the Constitution and the newly created Union of those States.³ As the tribal amici point out, Indian tribes were not "participants at the convention or signatories to the Constitution," and "... the Tribes' powers as governments do not derive from the Constitution or the United States, but are inherent." Miccosukee Tribe Br. at 10-11. Thus, if the States, by agreeing to the terms of the Constitution, consented to suits against themselves in federal court, we must then ask to whom was this consent given? Since the Indian tribes were not parties to the Constitution, the consent surely was not given to them. The consent could only have run either to the other States who were parties to the Constitution, the United States, or both.

³ See *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 423 (1792).

The conceptual problem with the "federal structure" argument is analogous to the difficulty faced by the Principality of Monaco in *Monaco v. Mississippi*, 292 U.S. 313 (1934), when it asserted that the States' consent to the "constitutional plan" runs to foreign states. This Court stated:

The waiver of consent, on the part of a State, which inheres in the acceptance of the constitutional plan, runs to the other States who have likewise accepted that plan, and to the United States as the sovereign which the Constitution creates. We perceive no ground upon which it can be said that any waiver or consent by a State of the Union has run in favor of a foreign State.

Monaco, 292 U.S. at 330.⁴

Since it is clear from the allocation of political power under the Constitution that the United States can bring suit against a State on behalf of Indian tribes,⁵ the claim

⁴ The Respondents try to distinguish *Monaco* on the theory that the Court was reacting to the subterfuge of transferring bonds from an individual to a foreign state to avoid the immunity bar. However, the theory fails in light of *South Dakota v. North Carolina*, 192 U.S. 286 (1904), where jurisdiction was found despite a similar transfer of bonds.

⁵ See *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831); *United States v. Minnesota*, 270 U.S. 181, 194, 195 (1926) and *United States v. Texas*, 143 U.S. 621 (1891).

The claim that through the Indian Commerce Clause the States gave Congress the authority to abrogate the States' Eleventh Amendment immunity in legislation involving Indian tribes is more problematic. It by no means follows that because Congress has the authority to abrogate the States' Eleventh Amendment immunity by virtue of its power to regulate commerce "among the several states," that it has the same authority by virtue of its power to regulate commerce "with the

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that the federal structure created by the Constitution requires that Indian tribes themselves must have this capacity would only make sense if there were no trust relationship between the United States and Indian tribes. However, there is such a relationship. Thus, there is nothing to sustain the premise that the federal system could not function unless Indian tribes are able to directly sue a State without its consent.

Another difficulty with the "federal structure" argument is that it is directly contradicted by Chief Justice Marshall's analysis in *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 18 (1831). If no constitutional basis could be found by Chief Justice Marshall on which to infer that Indian tribes had a right to sue a State in federal court, it becomes impossible to argue that the original plan of the Constitution required as much.

Finally, the "federal structure" argument overlooks the historical significance that the federal courts were not given federal question jurisdiction until 1875.⁶ Without federal question jurisdiction, the federal courts would have lacked any meaningful jurisdictional authority in disputes between States and Indian tribes. If "overwhelming implications" from the text of the Constitution lead one to conclude that the "federal structure" created by the Constitution requires that Indian tribes be able to

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Indian Tribes." See *Employees v. Missouri Dep't. of Public Health and Welfare*, 411 U.S. 279, 286, 287 (1973).

The status of the States and that of Indian tribes are fundamentally different under the plan of the Constitution. Thus, even if one assumes that the Indian Commerce Clause grants Congress the authority to abrogate a State's Eleventh Amendment immunity, it is obvious that Congress has not done so here. See *Dellmuth v. Muth*, 109 S. Ct. 2397 (1989).

⁶ Judiciary Act of March 3, 1875, 18 Stat. 470.

sue a State without its consent, how could it be that the federal courts lacked subject matter jurisdiction to entertain such suits until 1875, over eighty-five years *after* the Constitution was adopted? The obvious answer is that the "federal structure" created by Constitution cannot reasonably be understood to require that result.⁷

C. 28 U.S.C. § 1362 is not a Delegation of Authority to the Indian Tribes.

Circle Village argues that Congress delegated to the Indian tribes the power of the United States to sue a State when it enacted 28 U.S.C. § 1362.⁸ Therefore, Circle Village argues that the States' sovereign immunity is no bar because jurisdiction will always exist in the federal courts for such suits. Circle Village Br. at 36-45.

⁷ Their argument is further undercut by the fact that a proposal made in 1794 by Senator Gallatin to amend the Eleventh Amendment to permit cases arising under treaties made under the authority of the United States was overwhelmingly rejected by Congress. See *Welch v. Texas Dep't. of Highways and Public Transp.*, 483 U.S. 468, 485, n.18 (1987). The defeat of Sen. Gallatin's proposal has even more significance because the earliest conflicts between tribes and States were over lands "guaranteed to the tribes in federal treaties." *Miccosukee Br.* at 14.

⁸ Noatak also argues that this Court should not apply the "clear statement rule" in order to determine if Congress intended 28 U.S.C. § 1362 to be an abrogation of sovereign immunity. Their theory is that in 1966, the current state of the caselaw did not provide Congress with any notice that such a rule would be required. We disagree. Although this Court in *Parden v. Terminal Railway of the Alabama State Docks Dep't.*, 377 U.S. 184 (1964) adopted a different rule, four justices in dissent in *Parden* expressly "foreshadowed" just such a rule. *Parden*, 377 U.S. at 198-200. In addition, the dissent noted that

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Circle Village's reliance on *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976) is misplaced. Even the Court of Appeals below disagreed with their theory. *Native Village of Noatak v. Hoffman*, 896 F.2d 1157, 1162 (9th Cir. 1990). *Moe* involved the interpretation of § 1362, but the jurisdictional issue in that case was whether suit was barred by the provisions of 28 U.S.C. § 1341. In *Moe*, jurisdiction under § 1362 for prospective injunctive relief was found to exist against the State of Montana, notwithstanding the language of § 1341, but there was no finding of jurisdiction on the issue of monetary damages. 425 U.S. at 474-475, n.14.⁹

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earlier decisions of this Court consistently held that waiver of immunity "will be found only where stated by 'the most express language or by such overwhelming implication from the text as would leave no room for any other reasonable construction.'" *Parden*, 377 U.S. at 199-200, quoting *Murray v. Wilson Distilling Co.*, 213 U.S. 151 (1909). This Court also expressly rejected the same argument in *Dellmuth v. Muth*, 105 L.Ed.2d 181, 189-190 (1989). In addition, there is not even a hint of an intention to abrogate sovereign immunity in the legislative history.

⁹ Respondents also assert that obtaining prospective relief is somehow a part of this case. They seek to be "freed of the State executive policy" and the "continuing violation of federal law" that results in the abridgement of the respondents' "federally protected status as tribes and [treatment] . . . on racial rather than political grounds". Noatak Br. at 20.

These claims are wide of the mark. In 1985 the Alaska Legislature repealed the statute at issue in this case and replaced it with a statute (AS 29.89.050) expanding revenue sharing benefits to all unincorporated communities in the State of Alaska, including Noatak and Circle Village. The Respondents concede that this law is valid. Noatak Br. at 20. There can be no continuing violation of federal law because of such state action, since it is beyond dispute that there is no constitutional right to be the exclusive beneficiary of those revenue sharing benefits.

Circle Village's argument cannot stand scrutiny when the principles of sovereign immunity are properly considered. In *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985), this court considered ancillary jurisdiction over an indemnification claim against the State of New York for alleged violations of federal law. The Eleventh Amendment was found to be a bar to jurisdiction. 470 U.S. at 252, n.26. Under those principles the same result occurs when jurisdiction is asserted directly under § 1362.¹⁰

The proposition that a State's sovereign immunity must give way to an Indian tribe's rights under the Commerce Clause because of their weak condition stands constitutional principle on its head. In every instance, in the absence of a clear textual abrogation of a State's sovereign immunity, the Constitution requires that rights or powers conferred by the Commerce Clause yield to a State's sovereign immunity.¹¹ As indicated earlier, the

¹⁰ A number of cases have considered the effect of the doctrine of sovereign immunity upon the jurisdiction conferred by 28 U.S.C. § 1362 and concluded that in the absence of consent to suit or a waiver of sovereign immunity, jurisdiction is lacking under 28 U.S.C. § 1362. See *Assiniboine and Sioux Tribes v. Bd. of Oil and Gas*, 792 F.2d 782, 792 (9th Cir. 1986); *Standing Rock Sioux Tribe v. Dorgan*, 505 F.2d 1135, 1141 (5th Cir. 1974); and *Scholder v. United States*, 428 F.2d 1123, 1125 (9th Cir. 1970), cert. denied, 400 U.S. 942 (1970).

¹¹ *Pennsylvania v. Union Gas Co.*, ___ U.S. ___, 109 S.Ct. 2273 (1989); *Welch v. Texas Dep't of Highway*, 483 U.S. 468 (1987); *Employees v. Missouri Dep't of Public Health and Welfare*, 411 U.S. 279 (1973); *Ex Parte New York No. 1*, 256 U.S. 490 (1921).

proper focus should be on the identity of the defendant, not the plaintiff.

Finally, 28 U.S.C. § 1362 is not a delegation to Indian tribes of federal authority to bring lawsuits on behalf of Indians.¹² The statute provides access for Indian tribes to the federal courts for claims arising under federal law. The legislative history indicates the purpose of the statute was to remove the \$10,000 jurisdictional limitation of 28 U.S.C. § 1331 (especially for land claims whose value was often speculative and thus a hindrance to a court accepting jurisdiction), thus allowing Indian tribes to sue without the jurisdictional amount barrier when the federal government chose not to sue on their behalf. H.R. Rep. No. 2040, 89th Cong., 2d Sess. 3 (1966), reprinted in 1966 U.S. Code Cong. & Admin. News at 3146-47. Neither the legislative history nor the text support that it was intended to do anything more.

II. THE DETERMINATION OF TRIBAL STATUS REQUIRES A FACTUAL EXAMINATION.

Respondents' briefs create the erroneous impression that Petitioner believes no Alaska Native groups qualify as Indian tribes under federal law. On the contrary, we believe some Alaska Native groups may well meet the legal criteria for tribal status, while others – the Circle

¹² It is beyond dispute that the United States is held to "strict standards" in trust obligations to Indian tribes. See *Assiniboine and Sioux Tribes v. Bd of Oil and Gas*, 792 F.2d 782, 794 (9th Cir. 1986). If this were a delegation, one would expect that Congress, in undertaking such an important task as delegating its trust responsibility, would do so either by express language in a statute or at least by clear legislative history to that effect. Both are most noticeably absent.

Village Council, for example – could not possibly meet those criteria. Our point is that the merits of each group's claim to tribal status must be examined individually, because there is such a great variety in fact situations among Alaska Native groups. The Ninth Circuit erred by declaring that all Native groups within two categories were automatically tribes by operation of law, because some groups in those categories in fact have little resemblance to tribes and fail to meet existing criteria for tribal status.¹³ Respondents' briefs draw an erroneous portrait of the state of federal recognition of Alaska Native groups.

A. The Executive Branch has consistently refused to declare that all Alaskan Native groups are tribes.

Respondents claim that the Department of the Interior recognizes Alaska Native groups as tribes and base their theory on two factors: federal approval of constitutions under the Alaska Native Reorganization Act, 25 U.S.C. § 473a, and a list periodically published by Interior

¹³ In contrast is the holding of the Alaska Supreme Court that there are no tribes in Alaska except on reservations. *Native Village of Stevens v. Alaska Management & Planning*, 757 P.2d 32 (Alaska 1988). The State believes this blanket approach to be just as erroneous as the Ninth Circuit's blanket approach in the opposite direction, since neither one involves examination of the actual facts surrounding a claim of tribal status.

of Indian tribes and Alaska Native villages eligible for federal services.¹⁴

¹⁴ As to Interior's two lists, one of tribes in the Lower 48 and one of Native entities eligible for federal services in Alaska, respondents claim that by publishing the two together, Interior has implicitly declared the two to be the same. But the Interior list itself is the best proof of Interior's refusal to label these groups as tribes. This is best illustrated by two versions of Interior's Alaska list. When it first published a list of tribes, in 1979, Interior listed no Native groups in Alaska at all. When the list was republished in 1982, it contained two separate lists, one for recognized tribes (all in the Lower 48 states) and another list of "Alaska Native Entities Recognized and Eligible to Receive Services From the United States Bureau of Indian Affairs." The preamble to the list of Alaskan "Native Entities" explicitly stated that it was a list of entities in Alaska eligible for services from the BIA but which "are not historical tribes." The Alaska list, it said, was merely a "preliminary list show[ing] those entities to which the Bureau of Indian Affairs gives priority for purposes of funding and services." 47 Fed. Reg. 53133-53134 (1982). The Interior Department thus explicitly denied that it was a list of recognized tribes.

Subsequently, in 1988, the Interior Department modified the list by adding many additional groups and organizations, including regional, village, and urban corporations and "groups" created under the Alaska Native Claims Settlement Act. The Department's preamble was explicit: it was meant to include all Alaska Native groups receiving BIA assistance, but was not a statement of tribal status or governmental powers:

... Inclusion on a list of entities already receiving and eligible for Bureau funding and services does not constitute a determination that the entity either would or would not qualify for Federal Acknowledgment under the regulations, but only that no such effort is necessary to preserve eligibility. Furthermore, inclusion on or exclusion from this list of any entity should not be construed to be a determination by this Department as to the extent of the powers and authority of that entity. 53 Fed. Reg. 52832 (1988).

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Congress intended organization under the Alaska Native Reorganization Act to be available to a wide variety of Native groups, including tribes and non-tribal affinity groups.¹⁵ The Respondents argue that the purpose of the Alaska Native Reorganization Act was to make Alaska Natives eligible whether or not they had reservations; however the 1934 Indian Reorganization Act, 25 U.S.C. § 476, did not restrict its applicability to reservations, it was restricted to tribes. On the other hand, the Alaska Act made Native groups eligible whether or not they were tribes. Thus, mere organization under the Alaska Act cannot be taken as establishing tribal status.

These facts demonstrate one verity that is clear to all who have struggled with questions of Native sovereignty in Alaska over the last decade: Interior has consistently and adamantly refused to take a position on the status or powers of Alaska Native groups. It has instead left the question to a case by case examination by the courts, which have no other choice than to make a factual

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The preamble also notes that Alaska Native entities are eligible to obtain formal Federal Acknowledgment by following the procedures in the regulations, at 25 CFR Part 83. In summary, far from stating that these Alaskan Native groups are tribes, the Department has specifically disavowed any intention to acknowledge them as such.

¹⁵ See Pet. Br. at 30-37. In addition, Interior has never stated that approval of a constitution under the Alaska Native Reorganization Act is tantamount to recognition as a tribe; indeed, many of the approved constitutions state that the organization is of a group of persons with a common bond of residence or of occupation. Respondents have never explained how a fishermen's cooperative can be considered a tribe merely because it organized under the Alaska Act.

determination of whether any given claimant qualifies for tribal status.

B. Congress has never declared that all Alaska Native groups are tribes.

Respondents also claim that Congress has recognized all Alaska Native groups – or at least those listed in the Alaska Native Claims Settlement Act – as tribes, although they cannot point to any statute in which Congress has actually made such a declaration. Recognition, they claim, is “implicit” in Congress’s statutory treatment of Native groups. Their theory is insupportable.

1. Alaska Native Claims Settlement Act

Respondents claim that the Alaska Native Claims Settlement Act (ANCSA) was an implicit recognition of at least some Alaskan Native groups as tribes. To the contrary, Congress consciously avoided any mention of tribes and any involvement of Native councils or other entities such as respondents in fashioning ANCSA, and even abolished all existing reservations in Alaska except one. The list of entities eligible to charter ANCSA corporations is also far broader than “tribes” and included “any . . . group, village, community, or association.”¹⁶ Respondents argue that ANCSA was a “treaty substitute” because it dealt with matters that historically have been dealt with through an Indian treaty; therefore the entities dealt with in ANCSA should be considered to be tribes, since treaties are only made with tribes. The circularity of this argument is self-evident, but the most telling point is

¹⁶ 43 U.S.C. § 1602(c).

that contrary to the statements by the Respondents, there is no evidence that Congress saw ANCSA as a treaty or the Alaska Native lobbyists as tribes. In short, ANCSA is the best evidence that Congress has not chosen to deal with Alaska Natives as members of tribes, but has instead carefully avoided such designations.¹⁷

2. Other federal statutes

Respondents point to other federal legislation as indicating Congress considers Alaska Native villages to be tribes. Circle Village Br. at 22, n.21. However, in each of the listed statutes Congress made a distinction between tribes and these villages. For example, in three of the statutes,¹⁸ Congress defined as "tribes" all groups eligible for federal services to Indians, including urban corporations, ANCSA corporations, and any other organized "group or community of Indians." In short Congress used an expansive definition of "tribe" for those statutes in order to authorize delivery of federal services to Indians, regardless of whether they were members of

¹⁷ The most recent amendments to ANCSA explicitly disavow any intent to affect claims of "sovereign governmental authority" in "any Native organization." P.L. 110-241, sec. 2(8).

Respondents also make the argument that ANCSA must implicitly contain a recognition of tribal status, because only tribes can make land claims. This argument is self-evidently specious, since anyone can make a claim and the claimants in ANCSA never won a judgment of validity for their claims. Moreover, this settlement of claims explicitly referred to the claims, "if any", of Alaska Natives, 43 U.S.C. § 1603(b).

¹⁸ The Indian Financing Act of 1974, 25 U.S.C. § 1452(c); the Indian Self-Determination Act, 25 U.S.C. § 450b; and the Indian Health Care Improvement Act, 25 U.S.C. § 1903(8).

"tribes" in a political sense. In two of the statutes,¹⁹ Congress hedged on the entities listed as tribes by declaring that the definition fit them "if applicable" or if "recognized by the Secretary", thus making clear that it was not making a formal recognition through the statute, but merely applying the statute to tribes which have been recognized in other ways. In two of the statutes listed by respondents,²⁰ Congress added emphatic disclaimers that it was not, by including Alaska Native groups in the definition, validating any claim by them to a particular status or powers. In another of the statutes listed,²¹ Congress defined "municipality" to include tribes *or* Alaska Native villages or organizations, thereby making clear that the Alaska Native groups were not in the tribal category. And in one of the statutes cited by respondents, Congress limited its definition of "tribe" to Indian groups or communities exercising governmental authority over a federal Indian reservation, thereby eliminating all Alaska Native villages (except Metlakatla) from the definition of tribe.²²

In short, there is not a single federal statute that can be fairly read to be Congressional endorsement of the concept that Alaska Native villages and other Native groups are recognized tribes. The more easily reached conclusion is that Congress is willing to treat individual

¹⁹ Indian Tribal Government Tax Status Act, 26 U.S.C. § 7701(a)(40); Clean Water Act, 33 U.S.C. § 1377(h).

²⁰ Indian Tribal Government Tax Status Act, 26 U.S.C. § 7701(a)(40); Clean Water Act, 33 U.S.C. § 1377(g), (h).

²¹ Resource Conservation and Recovery Act, 42 U.S.C. § 6903(13)(A).

²² Clean Water Act, 33 U.S.C. § 1377(h).

Indians in Alaska as eligible for federal services as in the Lower 48, but it has not been willing to grant blanket recognition to Alaska Native groups as tribes. For Congress, as for the executive branch, tribal status remains a matter to be demonstrated by each claimant on the basis of its individual facts.

C. Some Alaska Native groups clearly do not qualify as tribes

Both respondents argue that Circle would qualify as a tribe under current law. This claim is disingenuous, given the facts in the record: The community was founded by non-Natives, had a non-Native majority until recent years; the Native council was not even formed until 1970; and most governmental and civic functions are performed by a different group, the multi-racial Circle Civic Community Association. See Exhibits to CR 21. Respondents cite no facts that would bring this group within the caselaw or the terms of 25 CFR Part 83.²³ If the Native residents of Circle constitute a tribe for federal purposes, with their thin basis for such a claim, then virtually any group of modern day Indians who maintain some sort of internal structure for some part of their lives also must be a tribe.

Our point, however, is not whether Circle is a tribe or not; it is that the process used by the Ninth Circuit to declare it a recognized tribe is improper. By applying a

²³ Circle cites a good deal of material regarding the Athabaskan Indians who inhabited the general area, but very little regarding the group of Indians who became residents of Circle. Circle Village Br. at 28-34. Respondent's only material relevant to the standards for tribal recognition comes from sources outside the record.

blanket rule, that *all* Native Villages and *all* entities organized under federal law are tribes, no matter what their individual circumstances and characteristics, the court brought within that category many groups with no discernible right to be called tribes. There is a great variety among Alaska Native groups. At one end of the continuum are Native organizations that appear to have as much right to tribal status as Lower 48 tribes with formal recognition. At the other end of the continuum are groups that bear no resemblance to Lower 48 tribes, do not have the history of tribes, and do not perform tribal functions. If the Ninth Circuit's "blanket recognition" were to prevail, there could be over 200 tribes and the real possibility of more, since so many groups are eligible to organize under the Alaska Native Reorganization Act. The only way to distinguish between true tribes and other Native groups and associations is to require fact-finding by the trial court of whether formal recognition by the federal government exists and, if not, whether the group meets the requirements of the caselaw and 25 CFR Part 83.^{24 25}

²⁴ Noatak claims that the state concedes it is a tribe and so there is no dispute in its case. It would be more accurate to say that the state believes that the Ninth Circuit's methodology for determining that it was a tribe was improper, but that if the proper methodology were used, a factual inquiry would probably show Noatak to be a tribe.

²⁵ We did not brief the question of whether a federal question exists in this case, believing it not to be certworthy. Nonetheless Noatak did brief it. Our only response is to point out one inaccuracy: Noatak claims that the Constitution permits states to discriminate in favor of Indians, citing dictum in an 1859 case. Noatak Br. at 8. We disagree. Recent caselaw says

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CONCLUSION

For all the reasons argued above the District Court lacked jurisdiction over this case. The decision of the Court of Appeals should be reversed and that of the District Court affirmed.

Respectfully submitted,

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that since states do not have a trust relationship with tribes, it is doubtful that they can provide benefits only to Indians without violating state equal protection provisions. *Washington v. Confederated Bands of the Yakima Indian Nation*, 439 U.S. 463, 500 (1979); *Queets Band v. State of Washington*, 765 F.2d 1399, 1404 (9th Cir. 1985).